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In the Supreme Court of the United States

OCTOBER TERM, 1974

JAMES E. DOW, ACTING ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL., PETITIONERS

v.

REUBEN B. ROBERTSON, III AND JEROME B. SIMANDLE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents contend that the exemption from disclosure in exemption 3 of the Freedom of Information Act for material "specifically exempted from disclosure by statute" is applicable only if the nondisclosure statute satisfies one or more of these criteria:

(a) it must identify particular records that are to be kept confidential and cannot describe them in broad general terms (Br. 10, 14-20);

(b) it must itself prohibit disclosure and cannot make disclosure turn upon the discretionary judgment of an official or agency (Br. 10, 20-23);

(c) it must provide standards governing disclosure that are more specific than the public interest (Br. 10, 23-26).

Although respondents acknowledge that exemption 3 "was never intended to overrule those previously enacted statutes which specifically limited public access to certain

documents" (Br. 12), they contend that Section 1104 of the Federal Aviation Act is not one of those statutes that exemption 3 was intended to preserve because Section 1104 does not meet any of the foregoing three criteria.

There is nothing in either the language or legislative history of exemption 3, however, which supports the gloss which respondents would place upon the simple phrase "specifically exempted from disclosure by statute." To the contrary, as set forth in our opening brief (pp. 17-22), the legislative history shows that Congress was aware that there was a large number of statutes providing for confidential treatment of government records, and that it intended to continue them in effect.[1] In the words of the House Committee Report on the Freedom of Information Act, the "nearly 100 statutes or parts of statutes which restrict public access to specific Government records * * * would not be modified by the public records provision of S. 1160 [the Senate Bill that was enacted as the Freedom of Information Act]" (H. Rep. No. 1497, 89th Cong., 2d Sess., p. 10).

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[1]All this legislative history relates to bills which contain the same language as exemption 3, except that the 1958 bill used the words "specifically exempt from disclosure by statute" whereas exemption 3 as enacted uses the word "exempted" in that phrase. As respondents acknowledge (Br. 16, n. 9), this minor change had "no significance."

The remarks of Senator Hruska, which respondents cite (Br. 15), confirm that the word "specifically" in exemption 3 refers to specific statutory authority and not to the specification of documents in the nondisclosure statute.[2] In response to a prior question by Senator Hruska, the Subcommittee's chief counsel stated:

> Mr. Chairman, I invite Senator Hruska's attention to the fact that we have located around 80 separate statutes providing for limiting information to be disseminated in many different categories, and none of those are affected by this particular amendment and this particular statute. So if there is specific authority in a statute, to an agency, executive department, or service or board or commission, it will not be affected by this amendment or this statute.
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> Senator Hruska: I am glad to know that. It emphasizes even more the point I tried to raise in questioning Mr. Newton. After all, that is a matter of policy. When a specific exception is made, that is a matter of congressional policy. * * * [Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on S. 921 (Freedom of Information and Secrecy in Government), 85th Cong., 2d Sess., p. 583.]

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[2]The use of the term "particular records or parts thereof" in S. 1663 and S. 1666, 88th Cong., 1st Sess., at the beginning of the section in those bills containing the exemptions does not show that the nondisclosure statutes must refer to specific documents to be within exemption 3. The Freedom of Information Act, as enacted, does not contain that phrase, but refers to "matters" which are exempt. 5 U.S.C. 552(b). Moreover, the words "particular records or parts thereof" in S. 1663 and S. 1666 were not intended to limit the scope of the nondisclosure statutes which were to continue in effect. As S. Rep. No. 1219, on S. 1666, 88th Cong., 2d Sess., explained (p. 12):

> Exception No. 3 relates to matter which "is specifically exempted from disclosure by statute." This exception has been added to insure that S. 1666 is not interpreted to override specific statutory exemptions.

Unlike most of the other exemptions to the Freedom of Information Act, exemption 3 does not provide its own standards for confidentiality.[3] Instead, Congress incorporated by reference the large number of nondisclosure statutes it had adopted over many years. In other words, Congress decided that it would not attempt to re-examine or distinguish past legislative judgments that various government records were to be kept confidential under varying standards that Congress had concluded were appropriate for dealing with the particular materials involved.

In adopting that approach, however, Congress did not separately analyze or evaluate the individual nondisclosure statutes or decide whether particular provisions should be continued or modified. Nor did it intend that, in applying exemption 3, the courts should conduct the kind of inquiry which respondents propose and which several courts of appeals improperly have pursued (see petition for a writ of certiorari, pp. 16-17 and Br. 16, n. 16). The judicial inquiry under exemption 3 is at an end once the court concludes that a federal statute provides for (*i.e.*, requires or permits) confidential treatment of government records.

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[3]The only other comparable exemption is exemption 1, which covers matters "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." As we pointed out in our main brief (pp. 14-15), in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, this Court rejected the theory that classification of material under an Executive Order which itself did not refer to specific documents was insufficient to bring those documents within the protection of exemption 1.

Respondents seek to distinguish *Mink* on the ground that the legislative history of exemption 1 expressly referred to the particular Executive Order (No. 10501) pursuant to which the documents in that case had been classified as top secret or secret (Br. 18-19). But that reference is parallel to the many references in the legislative history of exemption 3 to the large number of existing nondisclosure statutes which Congress intended to preserve in exemption 3.

Respondents do not explain precisely what standard they believe exemption 3 embodies. They state that their three criteria "should be examined in resolving questions as to the applicability of exemption 3" (Br. 10), and that the identification of specific documents is the "single most important test of an exemption 3 statute" (Br. 20), which "should be considered, along with other factors, in evaluating whether a statute comes within the third exemption" (Br. 22). Respondents thus suggest that in determining whether exemption 3 covers a particular nondisclosure statute, there is a considerable area of judgment in evaluating the weight to be given the three criteria.

As we have shown, this approach in applying exemption 3 is inconsistent with the congressional purpose of continuing the large number of nondisclosure statutes. Moreover, it would not provide any meaningful guidelines for government officials in passing upon the numerous requests they receive for disclosure of documents seemingly covered by exemption 3 or for the courts in deciding those cases.

2. Section 1104 of the Federal Aviation Act requires the Federal Aviation Administrator to withhold from public disclosure information obtained pursuant to the Federal Aviation Act, when in his judgment disclosure would adversely affect the interests of persons protesting disclosure and is not required in the public interest. Since the Administrator concluded that the SWAP reports involved in this case are required to be kept confidential under those standards, exemption 3 exempts those reports from disclosure.

Respondents contend (Br. 32-33) that Congress could not have intended to permit nondisclosure on the basis of the public interest standard in Section 1104, since one of the reasons for providing the specific exemptions in the Freedom of Information Act was to eliminate the practice under the prior public information section of the Ad-

ministrative Procedure Act by which government officials had withheld disclosure under a general public interest standard.[4] There is no inconsistency, however, between Congress eliminating a general standard of public interest as a basis for a general right of government officials to withhold records, and retaining specific nondisclosure statutes in which Congress gave those officials explicit authority to maintain confidentiality upon their evaluation that the public interest required it in a particular situation. For the latter statutes reflected a particularized legislative judgment that in a particular situation it was appropriate for the designated official to decide whether disclosure would be in the public interest. Under the Administrative Procedure Act, however, all government officials could refuse disclosure whenever they concluded that the subject "involved (1) any function of the United States requiring secrecy in the public interest * * * " (5 U.S.C. (1964 ed.) 1102; see *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 79).

There is no indication that Congress focused upon or was aware of the precise variations among the different standards in the existing nondisclosure statutes, or that it intended to limit the continued effectiveness of such statutes to those that had more detailed or specific

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[4]That provision—Section 3 of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002—provided:

> Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency
>
> * * * * *
>
> (c) Public Records.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

standards for nondisclosure than the frequently employed criterion of public interest.[5] To the contrary, the congressional design in exemption 3 was to continue the effectiveness of all existing statutes which specifically provided for nondisclosure (on whatever terms), but to end the practice by which government officials kept material confidential without specific authority to do so, on the ground that the public interest required it.

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[5]*E.g.*, 13 U.S.C. 302 (Secretary of Commerce may provide for the confidentiality of foreign commerce or trade information as he deems necessary or appropriate in the public interest); 15 U.S.C. 78x (the Securities and Exchange Commission, after an objection, may make available information filed with it only when disclosure is in the public interest); 38 U.S.C. 3301(6) (information pertaining to a Verterans Administration claim may not be disclosed to any person requesting the information except upon a determination by the Administrator, with approval of the President, that the public interest warrants or requires publication; 47 U.S.C. 412 (Federal Communications Commission may, in the public interest, keep confidential foreign radio communication agreements if publication would place American companies at a competitive disadvantage); 49 U.S.C. 913 (Interstate Commerce Commission shall not disclose contracts between a contract carrier and shipper except as part of a record of a formal proceeding where consistent with the public interest).

Section 1104 of the Federal Aviation Act is a statute which "specifically exempted" the material which it covers from disclosure, because it is one of the many statutes authorizing nondisclosure which Congress intended to preserve in exemption 3.[6]

CONCLUSION

For the foregoing reasons and those set out in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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[6]In our opening brief we pointed out (pp. 23-24) that Section 1104 was listed in an exhibit submitted to the Senate Committee Hearings in 1958 of "Statutory Provisions Restricting Disclosure of Government Information" which, the legislative history shows, Congress intended to preserve in exemption 3. Respondents argue (Br. 29-30) that because this compilation was submitted two days after the hearings closed, it is immaterial. The exhibit, however, is part of the record of congressional consideration of the problem of public information that resulted in the Freedom of Information Act, and as such is pertinent in interpreting the Act.

The fact, upon which respondents rely (Br. 28), that Section 1104 is not referred to in the 1960 compilation of nondisclosure statutes is irrelevant because, as pointed out in our main brief (p. 24), the compilation itself stated that it "does not purport to cover all of the Federal statutes." Finally, respondents argue (Br. 32) that the statements in the 1965 letters from the Civil Aeronautics Board to the House and Senate Committees that exemption 3 would cover Section 1104 are outweighed by the Board's statement two years earlier to the Senate Committee that "it may be argued" that exemption 3 "would have the effect of repealing sec. 1104 * * *." The Board's recognition that that argument could be made—as respondents are now doing—in no way undercuts the Board's subsequent statement of its view that exemption 3 would not have that effect.